IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1091

LINA LOVE, Appellant

v.

LESTER MAYNARD, Appellee

ON APPEAL FROM THE
COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

JURISDICTIONAL STATEMENT

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January 8, 1979

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JURISDICTIONAL STATEMENT

Lina Love, the appellant, appeals from the final judgment of the Court of Appeals of Franklin County, Ohio, dated June 7, 1978, (and for which the Supreme Court of Ohio refused to grant jurisdiction for an appeal on October 12, 1978) holding that Section 701.02 of the Ohio Revised Code is not violative of the Equal Protection Clause and Due Process Clause

of the Fourteenth Amendment of the Constitution of the United States.

OPINIONS BELOW

The Decision of the Court of Appeals of Franklin County, Ohio, issued on June 6, 1978, is not reported. It appears in the appendix hereto, p. 3a, infra.

The Decision and Entry of the Court of Common Pleas, Franklin County, Ohio, entered on May 2, 1977 and the Judgment Entry of the same court entered on November 17, 1977 were not reported. They appear in the appendix hereto, p. 1a and 2a, infra.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity of a state statute, Ohio Revised Code §701.02, infra, p. 5, (O.R.C. §701.02 herein) on that ground that it is

repugnant to the Constitution of the United States.

The appellant's personal injury claim against the appellee was tried on the issue of liability only to a jury which found the appellee negligent, the appellant not to be contributorily negligent, and the appellee (a police officer) to be responding to an emergency call. On November 17, 1977, the trial court dismissed appellant's cause of action on the ground that the immunity from liability granted to the police officer by the last paragraph of O.R.C. §701.02 was a complete bar to recovery of damages by the appellant.

On appeal, this dismissal was affirmed by the Court of Appeals of Franklin County, Ohio. The Court of Appeals specifically rejected appellant's challenge to the constitutionality of O.R.C. §701.02.

On further appeal, this dismissal was summarily affirmed by the Supreme Court of Ohio on October 12, 1978, when it denied jurisdiction for an appeal for the reason that no substantial constitutional question existed.

Timely notice of appeal to this Court was filed in the Court of Appeals of Franklin County, Ohio on January 4, 1979, Appendix, p. 10a, infra. This appeal is being docketed in this Court within 90 days from the dismissal of appellant's appeal below.

The following decisions sustain the jurisdiction of the Supreme Court to review the decisions on direct appeal in this case. Quilloin v. Walcott, 434 U.S. 246, 253 (1978); Key v. Doyle, 434 U.S. 59, 65 (1977); Levy v. Louisiana, 391 U.S. 68, 70 (1968).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

This case also involves O.R.C. §701.02 which states:

> Any municipal corporation shall be liable in damages for injury or loss to persons or property and for death by wrongful act caused by the negligence of its officers, agents, or servants while engaged in the operation of any vehicles upon the public highways of this state, under the same rules and subject to the same limitations as apply to private corporations for profit, but only when such officer, agent, or servant is engaged upon the business of the municipal corporation.
>
> The defense that the officer, agent, or servant of the municipal corporation was engaged in performing a governmental function, shall be a full defense as to the negligence of:
>
> (A) Members of the police department engaged in the operation of a motor vehicle while responding to an emergency call;

(B) Members of the fire department while engaged in duty at a fire, or while proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm.

Firemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle in the performance of a governmental function.

Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call.

QUESTION PRESENTED

Whether the last paragraph of O.R.C. §701.02, which grants total immunity from liability to police officers responding to an emergency call, violates the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

On February 6, 1973, in Columbus, the appellant, Lina Love, was struck by a police cruiser driven by the appellee, Maynard. At the time of the collision the appellee claimed he was responding to an emergency call and admitted he was traveling without flashing light or siren.

The plaintiff was seriously injured and her car substantially damaged. She has suffered (and will suffer in the future) loss of wages and considerable medical expenses.

On March 26, 1974 the appellant filed a complaint based on negligence against the appellee, a police officer, for the personal injuries and property damage caused her when he collided with her automobile.

On April 17, 1974 the appellee filed an answer stating a general denial and claiming as a defense that the appellant

was contributorily negligent; thereafter, in May, 1974, the appellee added a second defense, that he was operating a police cruiser on an emergency run.

The appellant filed on March 29, 1976 a Motion to Strike a Defense, moving to strike this second defense because it was based on the total immunity granted by the last paragraph of O.R.C. §701.02, which she submitted was repugnant to the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution of the United States.

This motion was denied on the grounds O.R.C. §701.02 was not unconstitutional in a Decision and Entry of the Court of Common Pleas, Franklin County, Ohio, entered May 2, 1977, Appendix, p. 1a, infra.

Starting on October 19, 1977, a two-day trial was held on the issue of liability only before a jury of eight. The defendant admitted at trial that he had

been traveling without light or siren prior to and when the collision occurred. The jury verdict was as follows:

> (1) the defendant was negligent and his negligence was the proximate cause of the collision;
>
> (2) the plaintiff, Mrs. Love, was not contributorily negligent; and
>
> (3) the defendant was responding to an emergency call at the time of the collision.

On November 17, 1977, based upon these verdicts and O.R.C. §701.02, the court entered judgment in favor of the defendant and against the plaintiff, and dismissed her case.

On December 12, 1977, the plaintiff, Mrs. Love, filed her appeal to the Court of Appeals of Franklin County, Ohio, appealing from the trial court's overruling of her Motion to Strike and from the trial court's Judgment Entry against her.

The Court of Appeals issued a decision on June 6, 1978, in which, "under the doctrine of stare decisis," it followed the prior determination of the Ohio Supreme Court issued in 1947 that O.R.C. §701.02 was a constitutional enactment, Appendix, p. 3a, infra.

A Notice of Appeal was filed on July 6, 1978 and a Memorandum in Support of Jurisdiction was filed by appellant in the Supreme Court of Ohio.

On October 12, 1978 the Supreme Court of Ohio made an entry without opinion, that such appeal was dismissed because no substantial constitutional question exists. Appendix, p. 9a, infra.

HOW THE FEDERAL QUESTION WAS PRESENTED

At the earliest opportunity available, appellant moved to dismiss the defense of appellee based on O.R.C. §701.02 on the grounds that the last paragraph of

§701.02 violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment of the United States Constitution. These arguments were fully briefed and presented to the trial court.

The trial court's entire decision states:

> The motion by plaintiff to strike defendant's defense of immunity while responding to an emergency call is OVERRULED. The Court finds that Section 701.02 of the Ohio Revised Code is not a denial of equal protection and is not unconstitutional. (McDermott v. Irwin, 148 Ohio St. 67.)

Appellant took an appeal from this decision and from the trial court's dismissal of her claim contained in its Judgment Entry of November 17, 1977.

Her Equal Protection and Due Process claims were reiterated in her appeal before the Court of Appeals of Franklin

County, Ohio. Appellant's assignments of error stated:

> 1. "The trial court erred when it refused to strike as unconstitutional the third defense of the defendant, which defense was based upon Ohio Revised Code Section 701.02."
>
> 2. "Judgment should have been rendered in favor of the plaintiff when, after a trial to the jury on the issue of liability, the jury found that the defendant was negligent, that the plaintiff was not contributorily negligent, but that the defendant was responding to an emergency call. Such judgment should have been in favor of the plaintiff because Section 701.02 of the Ohio Revised Code is unconstitutional and therefore as a matter of law is not a proper basis for awarding a judgment in favor of the defendant."

The Court of Appeals dismissed these assignments of error.

> "The constitutionality of R.C. 701.02, formerly 3714-1, General Code, was held to be constitutional in the case

of McDermott v. Irwin (1947), 148 Ohio St. 67, wherein, in the first paragraph of the syllabus, the Supreme Court held as follows:

> '1. Section 3714-1, General Code, is a constitutional enactment and was not repealed by the enactment of the Uniform Traffic Act (Section 6307-1 et seq., General Code).'

It appears that the equal protection clause and the due process clause were the two bases for the constitutional challenge to the emergency call statute involved here, and it would appear that the Ohio Supreme Court had found the emergency call statute to be constitutional based upon the challenges presently presented by this plaintiff-appellant. Accordingly, the court, under the doctrine of stare decisis, in following the prior determination by the Supreme Court, must uphold the decision of the court below which found that Officer Maynard was not liable for his negligence under the facts of the case, and that he was responding to an emergency call."

It thus considered and expressly rejected these federal constitutional claims.

On further appeal to the Supreme Court of Ohio, the appellant specifically raised her federal constitutional claims to have the pertinent portion of O.R.C. §701.02 struck down as repugnant to the Equal Protection and Due Process clauses of the Fourteenth Amendment of the Constitution of the United States.

The Ohio Supreme Court, without opinion, ruled that no substantial constitutional question existed; thus implicity it rejected appellant's federal constitutional claims.

THE QUESTION IS SUBSTANTIAL

As construed by the Court of Appeals of Franklin County, Ohio, and sustained by the Ohio's highest court, O.R.C. §701.02 prohibits an injured citizen from obtaining any judicial redress or

compensation for personal injuries and property damage caused by a police officer in a motor vehicle, if such officer was responding to an emergency call. This total bar to any recovery due to no fault or action of the injured party -- but granted solely because the tortfeasor was a police officer in a motor vehicle responding to an emergency call -- raises serious questions under both the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Moreover, the appeal presents a question concerning the validity and permissible scope of immunities from liability which a state may grant its agents. The statute in the instant case grants immunity from liability to police officers whose negligent conduct in the course of an emergency run causes extensive bodily harm and property damage. Citizens who

are injured by such conduct are, in effect, denied all remedies for the injuries they suffer since the city is also immune from liability for such injuries. O.R.C. §701.02. The Court noted in Monell v. Department of Social Services, 4336 U.S. 658 (1978), that immunity statutes would be scrutinized in the future to determine whether they comport with constitutional requirements. This appeal presents an opportunity to begin such scrutiny for it presents a statute which grants broad immunity not simply to the soveriegn, but also to agents and employees of the municipality, a group which traditionally has been subjected to liability in Ohio. United States Fidelity and Guaranty Co. v. Samuels, 116 Ohio State 586 (1927), 157 N.E. 325; Lingo v. Hoekstra, 176 Ohio State 417, (1964) 200 N.E. 2d 325. It is contended, as will be more fully set

forth below, that statutes which deprive a small class of injured persons the right to seek any compensation for their injuries deprives such persons of equal protection of the law and due process of law. Few issues are more substantial than the ability of a state to deprive absolutely its citizens of the right to seek compensation when their property and rights are taken by the negligent conduct of a political subdivision of the state and its agents.

The substantiality of the federal question is further underscored by the importance of the equal protection and due process arguments in this case.

I. O.R.C. SECTION 701.02 DENIES APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION BY TOTALLY PROHIBITING A CLASS OF INJURED PERSONS THEIR RIGHT TO JUDICIAL REDRESS AND COMPENSATION FOR INJURIES AND PROPERTY DAMAGE.

The Fourteenth Amendment to the United States Constitution reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It is well settled in Ohio that "at common law a police officer has no defense against liability for torts committed under color of office and is personally liable for his negligence in

performing official duties. United States Fidelity and Guaranty Co. v. Samuels, 116 Ohio St. 586, 157 N.E. 325;" Lingo v. Hoekstra, supra. At common law, then, the class of persons who suffered tortious injuries as a result of a policeman's negligent performance of official duties were accorded the right to seek a judicial remedy for the injuries they suffered. Neither the injured party nor the tortfeasor were subjected to special treatment on the basis of the status of the tortfeasor. While the circumstances existing at the time of the injury were considered, for example by balancing the allegedly tortious conduct against the emergency, if one existed, such balancing of circumstances has always been an integral part of tort law. However, O.R.C. §701.02 abrogates these fundamental doctrines and common law rights.

The last paragraph of O.R.C. §701.02 creates a class of persons who suffer tortious injuries and, in effect, deprives them of the remedy recognized at common law: the right to seek compensation from a police officer when the officer is responding to an emergency call. This paragraph provides:

> Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call.
>
> O.R.C. §701.02

A separate provision grants immunity to the city under similar circumstances. O.R.C. §701.02.. The combined effect of these provisions is to deny a person any remedy for death, injury or property damage when such injuries resulted from tortious conduct by a police officer in responding to an emergency call. Appellant submits

that O.R.C. §701.02 offends the Fourteenth Amendment of the United States Constitution because it denies her equal protection of the law by denying her a remedy which is available to others who are injured by the tortious conduct of police officers.

The Supreme Court has set forth the tests to determine whether a statute offends the Equal Protection clause. "To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

O.R.C. §701.02, in effect, creates a subclass of persons injured by the tortious conduct of police officers -- those injured by officers responding to emergency calls.

The statute then effectively denies this subclass a fundamental common law right which is accorded to all other persons who suffer tortious injury: the right to seek judicial redress and compensation for the injury occasioned by the tort. The subclass is carved out and the fundamental rights of subclass are subjected to differential treatment by the provisions of the statute.

As this Court has stated, however, differential treatment is not, per se, violative of the Equal Protection guaranty. "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by differential treatment." Police Department v. Mosley, 408 U.S. 92, 95 (1972). The Ohio Supreme Court has not fully articulated the governmental interest which is purportedly

furthered by the immunity granted to police officers by the challenged statute. However, the statute is clearly a safety measure. Presumably, by immunizing the officer from liability, the statute will promote prompt responses to emergency calls. Prompt responses, in turn, will increase the likelihood of apprehension of alleged criminals and correction of situations which may threaten the safety or welfare of some segments of the community. However, the statute fails to "suitably further" the public safety or welfare. The statute removes all checks and balances on the conduct of officers responding to emergency calls. In effect, it promotes tortious conduct by officers which will threaten public safety and welfare by exposing citizens to death, serious bodily harm, and extensive property loss. Public safety is not "suitable

furthered" by a statute which increases the exposure of the public to death, injury and bodily harm by denying those members of the public a right to seek compensation for such injuries when they are tortiously inflicted. Moreover, the promotion of tortious conduct by police officers is not a legitimate state interest.

The Court has, in the past, struck down statutory classifications which denied classes of potential litigants the right to seek compensation for tortious injuries. In Levy v. Louisiana, 391 U.S. 68 (1968) the court struck down on equal protection grounds a state statute which denied illegitimate children the right to recover for the wrongful death of the mother. The court noted that while the state has a legitimate interest in promoting family life, the statute did not rationally promote the purpose, but rather

invidiously discriminated against a class of persons "when no action, conduct, or demeanor of theirs is possibly relevant to the harm done. . . ." 391 U.S. at 72. In the instant case, denying injured motorists the right to recover from the tortfeasor does not rationally promote public safety but rather, it threatens such safety by removing an effective deterrant to police wrongdoing. Moreover, to paraphrase Levy v. Louisiana, supra, at 72, the statute invidiously discriminates "against [injured motorists] where no action, conduct or demeanor of theirs is possibly relevant to the harm that was done [to them]."

In Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 (1968), the Court struck down a statute which denied parents of illegitimate children the right to recover for the wrongful death

of such a child. The reasoning in Glona followed Levy: the statute did not reasonably further the state's interest in promoting legitimacy. The court noted that the statute, in effect, created an "open season" on illegitimates by removing the deterrant effect provided by a cause of action in tort. O.R.C. §701.02 suffers from the same infirmity: it creates an open season for police officers on all citizens whenever the radio relays an emergency call. Pursuant to the statute, the emergency call no longer creates a circumstance which is balanced with public safety concerns in the classic common law analysis of duty. Rather, when the radio call is received, the officer is no longer constrained by concerns for safety of that segment of the public which stands between him and the site of the purported emergency. These innocent bystanders are fair game. Public safety is

jeopardized and those who suffer the loss are denied any right to recover by O.R.C. §701.02. This result does not "suitably further" or rationally promote public safety. Moreover, the disabilities imposed by the statute contravene the "basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

The "emergency call" statute creates an arbitrary class of injured individuals who are denied a recovery. In this case an innocent, severely injured motorist is denied the right to recover for bodily injuries and property damage because the negligent driver was a police officer on an emergency run. The state's legitimate interest in public safety is not rationally furthered by the denial of recovery. In

fact, public safety is seriously jeopardized by the result. The interest in public safety is furthered only by the common law doctrine which balances the public interest in safety against the circumstances of the emergency in defining the duty of due care. Because the disabilities imposed upon the innocent subclass do not "suitably further" a legitimate state interest, they deny members of the subclass their constitutionally protected right to equal protection of the law.

II. O.R.C. SECTION 701.02 DENIES APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND COMPENSATION FOR THE TAKING OF PROPERTY (A) BY PREVENTING AN INJURED PARTY, NOT AT FAULT, FROM MAKING ANY RECOVERY FOR SUCH INJURIES AND (B) BY ALLOWING A MUNICIPAL GOVERNMENT AND ITS AGENTS TO TAKE PROPERTY WITHOUT JUST COMPENSATION.

The challenged statute, arguably, offends the constitutional guarantee of dur process in two respects. Substantive due process is offended by arbitrary laws as well as laws which take private property for public use without compensation. Procedural due process guarantees that certain safeguards must be provided before the state can deprive a person of valuable property and liberty rights. O.R.C. §701.02 is repugnant to all these aspects of the due process guaranty of the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment limits the power of the state. In order to satisfy due process, a state statute must promote a legitimate state interest, the means selected must rationally promote the legitimate purpose, and the statute must not unreasonably interfere with constitutionally recognized rights. See Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Wellington, Notes on Adjudication, 83 Yale L.J. 221 (1973).

As noted above in connection with the equal protection analysis, while O.R.C. §701.02 can be characterized as a safety statute, comprehended by the police power, the means selected by the statute to insure prompt responses by policemen to emergency calls -- the arbitrary imposition of disabilities on those injured by negligent conduct of the police officers -- does

not rationally promote public safety. In fact, by removing the only significant deterrant to tortious conduct by police officers, the statute undermines public safety by implicity authorizing negligent and even intentional misconduct. Thus the disabilities which O.R.C. §701.02 imposes on a class of injured persons lacks any reasonable relationship to the state's valid interest in public safety. Because the means selected do not reasonably promote a legitimate state purpose, the statute fails to meet the minimum due process standards.

Moreover, the statute offends due process because it is arbitrary in its imposition disabilities. The statute arbitrarily deprives persons injured by tortious conduct of policemen in responding to emergency calls, of their common law right to seek compensation by judicial

process. Lingo v. Hoekstra, supra. O.R.C. §701.02 denies that right to Ohioans when the tort is committed while the officer is responding to an emergency call. Justice Rehnquist recently stated, in Paul v. Davis, 424 U.S. 693, 710-711 (1976) (footnotes omitted), that:

> . . . There exists a variety of interests which are difficult of definition but are nonetheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the state seeks to remove or significantly alter that protected status. . . .
>
> It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment.

In the present case the appellant's interests in property and personal physical well being were taken by the tortious conduct of the defendant police officer. This taking was accomplished without notice or hearing or any other safeguard measures. Moreover, the statute denies the injured party any opportunity to seek compensation by establisning the fault of the policeman. Bell v. Burson, 402 U.S. 535 (1971) held that a state statute which provided for the automatic revocation of drivers licenses was offensive to due process because it did not provide the motorist with procedural safeguards of notice and hearing before revocation. Similar procedural safeguards have been extended to protect property rights of debtors in collateral. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Sniadach v. Family Finance Corp., 395, U.S. 337 (1969), as well as welfare benefits

and similar property and liberty benefits. Yet O.R.C. §701.02 deprives injured plaintiffs of fundamental common law rights of action for conpensatory damages without providing any effective opportunity for the issue of the defendant's alleged wrongdoing to be heard and decided. Certainly such legal rights are on a par with the property interests which were granted procedural protection in Bell, Mitchell, and others.

Finally, if the statute is found to reasonably and suitably further the state's legitimate interest in publicly safety, then substantive due process requires the government to compensate the appellant for the loss of property she suffered to achieve the public purpose. The Fifth Amendment to the United States Constitution provides ". . . nor shall private property be taken for public use without just compensation." This restraint on

governmental action applies against the states by the due process clause of the Fourteenth Amendment. Chicago, B. & Q. R.R. Co. v. Chicago, 166 U.S. 226 (1897).

In the instant case, appellant's property interests in her automobile and in her physical health and well-being were taken by the tortious conduct of the police officer. His negligent operation of the cruiser resulted in a collision which inflicted serious bodily harm on appellant and extensive property damage to her auto. The appropriate and traditional remedy of a cause of action in tort is effectively barred by O.R.C. §701.02. The confluence of appellee's conduct and the statutory bar result in a denial of compensation to appellant for the valuable property rights which were taken in the accident. If the immunity which the statute grants to the appellee is found to be rationally

related to the furtherance of public safety, those rights of appellant which were taken were valuable property which was applied, by appellee as an agent of the city (a political subdivision of the state) to public use. Such a result, for example, is as much a taking as the interference resulting from the overflights which were condemned in United States v. Causby, 328 U.S. 256 (1946).

The bar imposed by O.R.C. §701.02 in the instant case deprives the plaintiff of compensation for the property which was destroyed by the defendant's tortious conduct. The state statute, in effect, sacrifices such property to the public's interest in safety. Hence, property so destroyed is taken for a public use. Due process requires that compensation must be paid for such a taking. As Justice Brennan stated in National Board of YMCA v. U.S., 394 U.S.

85 (1969) at 90:

> "The Just Compensation Clause was 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' Armstrong v. United States, 364 U.S. 40, 49, (1960)."

THE DECISION APPEALED FROM RESTS UPON INADEQUATE STATE GROUNDS

The decision of the Court of Appeals of Franklin County, Ohio, purports to rest on both state and federal constitutional grounds. Thus this Court will inquire into the state ground to determine whether it is independent, tenable, and adequate to support the state court's judgment.

It is well established that the otherwise inherent power of the states to place disabilities upon its citizens is subject to restrictions set forth in several provisions of the United States Constitution, the Equal Protection and Due Process Clauses

being two of those. E.g. Levy v. Louisiana, supra, Glona v. American Guarantee & Disability Insurance Co., supra. If the immunity granted by O.R.C. §701.02 cannot be reconciled with the Fourteenth Amendment of the federal constitution, it will be invalid whether or not valid under the Ohio Constitution.

Thus, although the decision below is also based upon state constitutional law, such cannot be the basis for defeating the jurisdiction of this Court.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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January 8, 1979

APPENDIX FOLLOWS

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

LINA LOVE,

Plaintiff

-vs- Case No. 74CV-03-1064

LESTER MAYNARD,

Defendant

DECISION AND ENTRY

Filed May 2, 1977

Rendered this 2nd day of May, 1977.

REDA, J.

The motion by plaintiff to strike defendant's defense of immunity while responding to an emergency call is OVERRULED. The Court finds that Section 701.02 of the Ohio Revised Code is not a denial of equal protection and is not unconstitutional. (McDermott v. Irwin, 148 Ohio St. 67.)

Frank A. Reda, Judge

JUDGMENT ENTRY

Filed November 17, 1977
[Caption Omitted in Printing]

This action came on for trial before the Court and a jury on the issue of liability only and the issue having been duly tried and a jury having duly rendered its verdicts as follows:

1. Being duly impaneled and sworn, find that the defendant was negligent and his negligence was the proximate cause of the collision.

2. Being duly impaneled and sworn, find that the plaintiff was not contributory [sic] negligent.

3. Being duly impaneled and sworn, find that the defendant was responding to an emergency call at the time of the collision.

Therefore, in accordance with McDermott vs. Irwin, 148 O.St. 67, it is ordered and adjudged that the plaintiff take

nothing, that the action be dismissed on the merits, and that the defendant recover of the plaintiff his costs of action.

DATED: November 17, 1977

Judge Frank A. Reda

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

Lina Love,

Plaintiff-Appellant

-vs- No. 77AP-920

Lester Maynard,

Defendant-Appellee

DECISION

Rendered on June 6, 1978

HOLMES, P.J.

This matter involves the appeal of a judgment of the Common Pleas Court of Franklin County wherein the court dismissed

the plaintiff Love's negligence action against defendant Lester Maynard, in which action it was alleged that plaintiff, while driving her automobile, was injured when run into by the defendant, an officer who at the time was driving a police vehicle and responding to an emergency while on duty.

The facts in essence are that the plaintiff was driving her automobile on the streets of Columbus on February 6, 1973, and the defendant-appellee Lester Maynard was responding to a burglary in process alarm when his police car collided with the car driven by Mrs. Love. Mrs. Love alleged injuries to herself and her automobile. At the trial hereof on the issue of liability the jury found that Officer Maynard was negligent and that Mrs. Love was not contributorily negligent. The jury also found that Officer Maynard was

responding to an emergency call. Thereafter, pursuant to R.C. 701.02, the trial court dismissed Mrs. Love's case and entered judgment on behalf of Officer Maynard.

The plaintiff-appellant appeals, setting forth the following assignments of error:

> 1. "The trial court erred when it refused to strike as unconstitutional the third defense of the defendant, which defense was based upon Ohio Revised Code Section 701.02."
>
> 2. "Judgment should have been rendered in favor of the plaintiff when, after a trial to the jury on the issue of liability, the jury found that the defendant was negligent, that the plaintiff was not contributorily negligent, but that the defendant was responding to an emergency call. Such judgment should have been in favor of the plaintiff because Section 701.02 of the Ohio Revised Code is unconstitutional and therefore as a matter of law is not a proper basis for awarding a judgment in favor of the defendant."

R.C. 701.02, within the last paragraph of such section, grants immunity from personal liability to policemen while responding to an emergency call. Such paragraph reads as follows:

> "Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call."

The constitutionality of R.C. 701.02, formerly 3714-1, General Code, was held to be constitutional in the case of McDermott v. Irwin (1947), 148 Ohio St. 67, wherein, in the first paragraph of the syllabus, the Supreme Court held as follows:

> "1. Section 3714-1, General Code, is a constitutional enactment and was not repealed by the enactment of the Uniform Traffic Act (Section 6307-1 et seq., General Code)."

It appears that the equal protection clause and the due process clause were

the two bases for the constitutional challenge to the emergency call statute involved here, and it would appear that the Ohio Supreme Court had found the emergency call statute to be constitutional based upon the challenges presently presented by this plaintiff-appellant. Accordingly, the court, under the doctrine of stare decisis, in following the prior determination by the Supreme Court, must uphold the decision of the court below which found that Officer Maynard was not liable for his negligence under the facts of the case, and that he was responding to an emergency call.

Therefore, the assignments of error of the plaintiff-appellant are hereby dismissed, and the judgment of the Common Pleas Court of Franklin County is hereby affirmed.

STRAUSBAUGH and REILLY, JJ., concur.

JOURNAL ENTRY OF JUDGMENT

Filed June 7, 1978

[Caption Omitted in Printing]

For the reasons stated in the decision of this court rendered herein on June 6, 1978, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

HOLMES, P.J., STRAUSBAUGH and REILLY, JJ.

By_____
Judge Robert Holmes, P.J.

THE SUPREME COURT OF OHIO

Lina Love,

Appellant

-vs-

Lester Maynard,

Appellee

To wit: October 12, 1978

No. 78-999

APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN COUNTY

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

LINA LOVE,

Appellant

-vs-

Case No. 77AP-920

LESTER MAYNARD,

Appellee

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Filed January 4, 1979

Notice is hereby given that Lina Love, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Franklin County, Ohio, entered in this action on June 7, 1978, affirming the judgment of the Court of Common Pleas, Franklin County, Ohio, entered on November 17, 1977, and for which the Supreme Court of Ohio refused to grant jurisdiction for an appeal on October 12, 1978.

This appeal is taken pursuant to 28 U.S.C. §1527(2).

MOOTS, HULTIN, WEINBERGER & COPE

_____
Jerry M. Hultin

AFFIDAVIT OF SERVICE was attached.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

Case No. 78-1091

Lina Love,
Appellant,

vs.

Lester Maynard,
Appellee

On Appeal From The
Tenth District Court of Appeals,
Franklin County, Ohio

MOTION TO DISMISS OR AFFIRM

CITY OF COLUMBUS
DEPARTMENT OF LAW
GREGORY S. LASHUTKA
CITY ATTORNEY
Patrick M. McGrath
Chief Counsel
Paul M. Aucoin
Trial Attorney

ATTORNEYS FOR APPELLEES

February 28, 1979

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ISSUE PRESENTED FOR REVIEW

WHETHER THE LAST PARAGRAPH OF OHIO REVISED CODE SECTION 701.02, WHICH GRANTS TOTAL IMMUNITY FROM LIABILITY TO POLICE OFFICERS RESPONDING TO AN EMERGENCY CALL, VIOLATES THE EQUAL PROTECTION CLAUSE AND DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

PART ONE

THIS APPEAL SHOULD BE DISMISSED BECAUSE IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION. ADDITIONALLY, THE ALLEGED UNCONSTITUTIONALITY OF THE CHALLENGED STATUTE IS BASED UPON THE PURPORTED UNREASONABLENESS OF STATUTORY LANGUAGE NOT WITHIN THE JURISDICTION OF THIS APPEAL.

This Court has been presented with the following single issue for resolution in this appeal:

> Whether the last paragraph of Ohio Revised Code Section 701.02, which grants total immunity from liability to police officers responding to an emergency call, violates the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment.

Should this Court decide to set this case for argument, the only analysis relevant to this issue will be whether the specific governmental immunity outlined above operates to deny the plaintiff-appellant any equal protection or due process rights. The rationality of the statute will depend only and entirely upon whether the police officer's immunity, rather than the municipality's immunity, is reasonable and furthers a legitimate state interest. However, plaintiff-appellant, in her

Memorandum of Jurisdiction, has relied upon the unreasonableness of the municipality's immunity, as granted in the second paragraph of Ohio Revised Code Section 701.02, which states:

> The defense that the officer, agent, or servant of the municipal corporation was engaged in a governmental function, shall be a full defense as to the negligence of: (A) Members of the police department engaged in the operation of a motor vehicle while responding to an emergency call.

Read together, the preceding paragraph and the challenged paragraph admittedly operate as a total bar to recovery by plaintiffs who are injured by police officers while responding to an emergency call. However, plaintiff-appellant never raised the constitutionality or unreasonableness of the municipality's immunity, and this immunity's status is not now within the jurisdiction of this Court on appeal.

The legal effect of this failure to raise the constitutionality of the municipality's immunity has been the plaintiff-appellant's continued reliance upon the police officer's immunity as being a total bar to recovery by the plaintiff. This is simply not the case. The last

sentence of Ohio Revised Code Section 701.02 only extinguishes a plaintiff's claim against a particular police officer, not the municipality.

This distinction is significant in this appeal, as the issue deals with the alleged unconstitutionality of the "emergency call" statute under the Equal Protection and Due Process clauses. Under these clauses, the rationality between the affected classification created by the statute and the furtherance of a state's legitimate interest is analyzed. In this case, the standard is essentially reasonableness (the "rational-basis" test). Thus, the allegation that a police officer's immunity operates as a total bar to recovery by an injured plaintiff could arguably relate to the reasonableness of the statute. But the only part the of statute properly before this Court does not deal with a total bar to recovery, but only a partial bar. Furthermore, since plaintiff is much less likely to collect substantial damages from the police officer than he or she could collect from the municipality, the part of the statute that is arguably the most harmful to prospective plaintiffs is not the police officer's immunity, but the municipality's immunity.

This appeal must be dismissed because it is predicated on the notion that the police officer's immunity denies injured plaintiffs the right to any recovery. Indeed, all of the plaintiff's cited cases dealing with this issue are concerned with the unconstitutionality of some statute which bars total access to the courts [(Levy v. v. Louisiana, 391 U.S.68 (1968), Olona v. American Guarantee and Liability Insurance Co., 391 U.S. 73 (1968), and National Board of YMCA v. U.S., 394 U.S. 85 (1969)]. The case at bar only deals with a partial denial of recovery to prospective plaintiffs.

In conclusion, this appeal should be dismissed because a necessary part of the challenged statute is not before this Court. In the alternative, the Court should only consider the police officer's immunity as a partial denial of access to the Ohio courts when evaluating its reasonableness.

PART TWO

THE JUDGMENT FROM THE FRANKLIN COUNTY, OHIO COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE THE QUESTIONS UPON WHICH THE DECISION OF THE CASE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

While arguably raising the question of the constitutionality of the last sentence of Ohio Revised Code Section 701.02 (the "emergency call statute") under the Due Process and Equal Protection clauses of the United States Constitution, this appeal has raised no request for a new constitutional standard, no request for an abrogation of existing constitutional law standards, and no request for an extension of heretofore protected federal civil rights. Therefore, this appeal should be considered to be a request by the appellant to have the "emergency call" statute analyzed under existing constitutional standards. As such, this request by the appellant, if honored, would be a needless and repetitive endeavor by the United States Supreme Court. The

defendant-appellee submits that this Court should consider this Motion to Affirm a proper stage to undertake an adequate analysis of the "emergency call" statute under the Due Process and Equal Protection clauses. For the reasons stated below, this Court should affirm the holding of the Franklin County Court of Appeals and uphold the constitutionality of the "emergency call" statute.

A. The Emergency Call Statute Does Not Deprive The Plaintiff-Appellee Of Her Rights Under The Equal Protection Clause.

In Dunn v. Blumstein, 405 U.S. 330, 335 (1972), this Court set forth the method in which Courts are to determine whether a statute offends the Equal Protection clause:

> To decide whether a law violates the Equal Protection clause, we look, in essense to three things: the character of the classification in question; the individual affected by the classification; and the government interests asserted in support of the classification.

The "emergency call" statute creates a class of police officers who are immune from damages for torts committed while responding to an emergency call. Arguably, the statute also creates a class of injured persons who cannot collect from these police officers. However, neither classification is of such a nature as to invoke the "strict scrutiny" standard of review utilized in equal citizenship cases (race, national origin, religion, alienage in certain situtations, and other "suspect" classes). Nor does either case involve a fundamental interest, which would also invoke the "strict scrutiny" standard of review.

It should be pointed out that the appellant, in her "Memorandum of Jurisdiction," has raised the notion that the class of persons who cannot collect from police officers who commit a tortious act while responding to an emergency call are denied a "fundamental common law right which is accorded to all other persons who suffer tortious injury: the right to seek judicial redress and compensation for the injury occasioned by the tort".

This is not the type of fundamental right that has been uniquely protected by the Court since this Court's "right to vote" holding in Griffin v. Illinois, 351 U.S. 12 (1956). Other fundamental rights have included the right to interstate travel, the right to interracial marriage, the right to appellate access in criminal cases, and the rights of prisoners to be assisted in filing habeas corpus papers. Indeed, Professor Kenneth Karth, in his article, "Forward: Equal Citizenship Under The Fourteenth Amendment", 91 Harv. L. Rev. 1,29 (1977), states:

> The Court has not yet concluded that all denials of access to the courts require strict scrutiny of their justifications. Indeed, the expansion of this category of fundamental interests, at least in civil cases, seems for now to have been called to a halt.

Since the classification created by the emergency call statute involves neither a suspect class nor a fundamental right, the appropriate standard of review is the "rational basis" test, wherein the State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification. McGowan v. Maryland,

366 U.S. 420 (1961). As this Court pointed out in the recent case of Foley v. Connelie, ___ U.S. ___, 55 L.Ed.2d 287, 292 (1978):

> The practical consequence of this theory is that our scrutiny will not be so demanding where we deal with matters firmly within a State's constitutional prerogatives.

The "emergency call" statute is clearly within a State's "constitutional prerogative." State and federal courts have consistantly viewed statutes which create governmental immunities as extensions (or limitations) of a state's sovereign immunity powers under the Eleventh Amendment of the United States Constitution. Indeed, in Agnew v. Porter, 23 Ohio St. 2d 18 (1970), the Ohio Supreme Court defined the "emergency call" defense as a governmental immunity. The United States Supreme Court has long recognized that a state has the sole power to determine whether or not it has consented to be sued. In Palmer v. Ohio, 248 U.S. 32, 35 (1918), this Court held:

> Whether Ohio gave the required consent (to be sued) must be determined by the construction to be given to the (State's) constitutional amendment quoted, and this is a question of local state law, as to which the decision of the state supreme court is controlling with this court, no Federal right being involved.

This Court should now consider the policies and purposes behind Ohio's "emergency call" statute.

Many state courts, including the Ohio Supreme Court, have had occasion to articulate the purposes of "emergency call" statutes. In Agnew, supra, at 25, the Ohio Supreme Court reasoned that:

> An officer must be able to respond to the calls of others that help is needed immediately without the need to initiate a cross-examination calculated to elicit the operative facts upon which the judgment of urgency is based ..... It is the policy of the law to free him from apprehension of liability in case of "false alarm" or cry of "wolf".

Moreover, the California Supreme Court, in Lucas v. Los Angeles, 10 Cal 2d 426, 75 P2d 599 (1938) reasoned that emergency call statutes read in pari materia with other regulatory statutes, disclosed the clear intention of the legislature to recognize the paramount necessity of providing a clear and speedy pathway for emergency

vehicles actually confronted with an emergency in which the entire public might be concerned. In Archer v. Johnson, 90 Ga. App. 418, 83 SE 2d 314, a Georgia appellate court ruled that the public interest required that law enforcement officers in the discharge of their duty to be given sufficient latitutde of action and ample protection and that the immunity available in an "emergency call" statute should apply to negligent acts.

Without the "emergency call" statute, police officers would be in an unenviable situation. If a police officer felt that he or she would be second guessed by a jury as to whether the emergency call dictated the type of action that the police officer took, it is highly unlikely that a police officer would ever "hastily" approach an emergency scene. Where would the public be then? Where would the criminals be?

There are a number of serious deterrents to tortious conduct on the part of the police officer responding to an emergency call. First, since a police officer obviously and necessarily risks great bodily harm

or even death when he drives "negligently," it is highly unlikely that the "emergency call" statute encourages apolice officer to drive recklessly. It is this proposition that makes the "emergency call" statute rational. If police officers could insulate themselves from this risk of great bodily harm, then perhaps plaintiff's assertion that the statute encourages tortious behavior would have some, albeit weak, merit. It, after all, would make little sense to injure one innocent person in order to protect another. But, thankfully, this is not the case. A police officer is not insulated from risk of death or great bodily harm, and even though the officer may accelerate to a speed beyond the posted speed limit, he will do so with great caution so that he can protect himself as well as other drivers.

Second, police officers who drive in a manner which disregards the safety of others face a number of potentially harmful repercussions. They cannot recover as a plaintiff if they themselves are personally harmed, they can be disciplined and even fired if their negligence

is not in some way justified, and they may be subjected to criminal prosecution if their driving behavior does not fall within justifiable parameters.

For the reasons outlined above, Ohio's emergency call statute is reasonable and rationally related to the creation of a class of persons who cannot recover against the police officer.

B. The Emergency Call Statute Does Not Deprive The Plaintiff-Appellant Of Her Rights Under The Due Process Clause.

In Paul v. Davis, 424 U.S. 693 (1976) and Meachum v. Fano, 427 U.S. 215 (1976), this Court outlined the parameters of due process protection for rights protected by state law. Those cases held that a deprivation must consist of a taking of some recognized "right to life, liberty, or property," which may be either a fundamental right (such as voting, interstate travel, etc.) or a state protected right. In this case, there is neither.

As noted earlier, there is no fundamental right involved in an injured person's inability to successfully recover damages from a tortious police officer who is responding to an emergency run. Neither federal constitutional law nor Ohio law require access to state courts for all types of tortious acts or claims. As this Court held in Palmer v. Ohio, supra:

> Persons suing a state for damages are not deprived of their property without compensation, in violation of the Fifth (or Fourteenth) Amendment of the Federal Constitution, by a decision of the court that a state had not consented to be sued.

Moreover, Ohio obviously does not recognize any state right heretofore advanced by the plaintiff-appellant. More simply stated, the State of Ohio has not created any right to which the plaintiff has been denied. There is no "right" for any person to sue a police officer for damages caused while operating a motor vehicle in response to an emergency call. This is a legislative grant of immunity that has been continuously upheld by the Ohio Supreme Court. Agnew v. Porter, supra;

McDermott v. Irwin, 148 Ohio St. 67 (1947); and Lingo v. Hoekstra, 176 Ohio St. 417 (1964). Having no right to sue, plaintiff-appellant has been deprived of none.

Assuming arguendo that there is some substantive right to access for an injured plaintiff towards the police officer tortfeasor, there has been no "taking" or "deprivation" as that term has been used by this Court. All of the cases which deal with procedural due process and unconstitutional "takings" deal with an intentional act or procedure. These intentional acts are of two types: arbitrarily administrative "takings" (See Bell v. Burton, 402 U.S. 525; Morrissey v. Brewer 408 U.S. 471; and Shields v. Utah C.R. Co.., 305 U.S. 177) or intentional deprivations of life, liberty, or property (See Board of Regents v. Roth, 408 U.S. 564 (1972); Goss v. Lopez, 419 U.S. 565 (1975); and Wisconsin v. Constantineau, 400 U.S. 433 (1971). No deprivation has ever been found by this court or any circuit court in a case dealing with an

automobile accident caused by simple negligence. Indeed, under proper due process analysis, this case is not a procedural due process case at all, but rather a substantive due process case, barely distinguishable from an equal protection case.

Under substantive due process, a statute is unconstitutional if it affects a class of injured persons in a manner not reasonably related to a legitimate purpose. Roe v. Wade, 410 U.S. 113 (1973). Since this analysis was conducted earlier under a discussion of the equal protection clause, defendant-appellee will not repeat the entire analysis other than to point out that the purpose of the statute is to encourage police officers to respond quickly to emergency calls. Without immunity from personal liability, it is unlikely that a police officer will "hastily" respond to an emergency call.

The "emergency call" statute, insomuch as it relates to the immunity of the police officer tortfeasor, does not violate the Due Process clause of the U.S. Constitution.

CONCLUSION

For the reasons stated above, the Supreme Court of the United States should dismiss this appeal because there is no substantial federal question. In the alternative, this Court should affirm the decision of the Franklin County Court of Appeals because the issue presented is so unsubstantial that it does not require further argument.

Respectfully submitted,

Paul M. Aucoin, Trial Attorney
Assistant City Attorney

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AFFIDAVIT OF SERVICE

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

Pursuant to Rule 34.3(c) of the Rules of the United States Supreme Court, I, Paul M. Aucoin, do hereby swear under oath, that:

1. I am an attorney, duly licensed to practice law in the State of Ohio and the U. S. District Court for the Southern District of Ohio, and that,

2. I represent the Appellee, Lester Maynard, and that,

3. I have served a single copy of the attached Motion to Dismiss or Affirm by depositing same and a copy of this Affidavit in a United States Post Office, with first class postage prepaid, to Mr. Stewart R. Jaffy, c/o Mr. Jerry Hultin, Attorneys for Appellant, 21 East State Street, Suite 1100, Columbus, Ohio, 43215, and that,

4. All parties required to be served have been served.

Paul M. Aucoin, Trial Attorney

Sworn to before me and subscribed in my presence this 27th day of February, 1979.

Jacqueline F. Stevens
Notary Public, State of Ohio
My Commission expires 3/27/82